



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-613 Remand]

Certain 3G Mobile Handsets and Components Thereof; Commission Decision to Review in Part a Final Initial Determination on Remand; Request for Written Submissions

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the presiding administrative law judge's ("ALJ") final initial determination on remand ("RID") issued on April 27, 2015, making findings concerning whether there is a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337").

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The

public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Inv. No. 337-TA-613 on September 11, 2007, based on a complaint filed by InterDigital Communications Corp. of King of Prussia, Pennsylvania and InterDigital Technology Corp. of Wilmington, Delaware (collectively, "InterDigital") on August 7, 2007. 72 FR 51838 (Sept. 11, 2007). The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain 3G mobile handsets and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 7,117,004 ("the '004 patent"); 7,190,966 ("the '966 patent"); 7,286,847 ("the '847 patent"); and 6,693,579 ("the '579 patent"). The Notice of Investigation named Nokia Corporation of Espoo, Finland ("Nokia") and Nokia Inc. of Irving, Texas ("Nokia Inc.") as respondents. The Office of Unfair Import Investigations ("OUII") was named as a participating party. The Commission later amended the Notice of Investigation to substitute complainant InterDigital Communications, Inc. for InterDigital Communications Corp. Notice (Feb. 15, 2015); Order No. 53 (Jan. 14, 2015). The Commission also later amended the Notice of Investigation to add Microsoft Mobile OY ("MMO") as a party. 79 FR 43068-69 (July 24, 2014).

On February 13, 2009, InterDigital moved for summary determination that a domestic industry exists because its licensing activities in the United States satisfy the domestic industry requirement under 19 U.S.C. 1337(a)(3)(C). On March 10, 2009, the presiding Administrative Law Judge ("ALJ") issued an initial determination ("ID") (Order No. 42) granting the motion. On April 9, 2009, the Commission determined not to review the ID. Notice (Apr. 9, 2009).

On August 14, 2009, the ALJ issued his final ID, finding no violation of section 337. In particular, he found that the asserted claims of the patents-in-suit are not infringed and that they are not invalid. The ALJ further found no prosecution laches relating to the '004, '966, and '847 patents and that the '579 patent is not unenforceable.

On October 16, 2009, the Commission determined to review the final ID in part. 74 FR 55068-69 (Oct. 26, 2009) ("Notice of Review"). In particular, although the Commission affirmed the ID's determination of no violation of section 337 and terminated the investigation, the Commission reviewed and modified the ID's claim construction of the term "access signal" found in the asserted claims of the '847 patent. The Commission also reviewed, but took no position on, the ID's construction of the term "synchronize" found in the asserted claims of the '847 patent. The Commission further reviewed, but took no position on, validity with respect to all of the asserted patents. The Commission did not review the ID's construction of the claim limitations "code" and "increased power level" in the asserted claims of the '966 and '847 patents.

InterDigital timely appealed the Commission's final determination of no violation of section 337 as to claims 1, 3, 8, 9, and 11 of the '966 patent and claim 5 of the '847 patent to the Federal Circuit. Specifically, InterDigital appealed the final ID's unreviewed constructions of the claim limitations "code" and "increased power level" in the '966 and '847 patents. Respondent Nokia, the intervenor on appeal, raised as an alternate ground of affirmance the issue of whether the Commission correctly determined that InterDigital has a license-based domestic industry.

On August 1, 2012, the Federal Circuit reversed the Commission's construction of the claim limitations "code" and "increased power level" in the '966 and '847 patents, reversed the

Commission's determination of non-infringement as to the asserted claims of those patents, and remanded to the Commission for further proceedings. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n.*, 690 F.3d 1318 (Fed. Cir. 2012). In particular, the Court rejected the final ID's construction of the "code" limitation as being limited to "a spreading code or a portion of a spreading code" and, instead, construed "code" as "a sequence of chips" and as "broad enough to cover both a spreading code and a non-spreading code." *Id.* at 1323-27. The Court affirmed the Commission's determination that InterDigital has a domestic industry. *Id.* at 1329-30. Nokia subsequently filed a combined petition for panel rehearing and rehearing en banc on the issue of domestic industry. On January 10, 2013, the Court denied the petition and issued an additional opinion addressing several issues raised in Nokia's petition for rehearing. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n.*, 707 F.3d 1295 (Fed. Cir. 2013). The Court's mandate issued on January 17, 2013, returning jurisdiction to the Commission.

On February 4, 2013, the Commission issued an Order directing the parties to submit comments regarding what further proceedings must be conducted to comply with the Federal Circuit's remand. Commission Order (Feb. 4, 2013). On February 12, 2014, the Commission issued an Order and Opinion deciding certain aspects of the investigation and remanding other aspects to the Chief ALJ. 79 FR 9277-79 (Feb. 18, 2014); see also Comm'n Op. Remanding Investigation (Feb. 12, 2014); Comm'n Order Remanding Investigation (Feb. 12, 2014). On February 24, 2014, Nokia petitioned for reconsideration of the Commission's remand Order and Opinion. On March 24, 2014, the Commission granted in part the petition for reconsideration and issued a revised remand notice, order, and opinion. 79 FR 17571-73 (Mar. 28, 2014).

On April 27, 2015, the ALJ issued the RID. The ALJ found that the accused Nokia handsets meet the limitations "generated using a same code" and "the message being transmitted

only subsequent to the subscriber unit receiving the indication” recited in the asserted claims of the ’966 and ’847 patents. The ALJ also found that the pilot signal (P-CPICH) in the 3GPP standard practiced by the accused Nokia handsets satisfies the limitation “synchronize to the pilot signal” recited in the asserted claim of the ’847 patent. The ALJ further found that the currently imported Nokia handsets, which contain chips that were not previously adjudicated, infringe the asserted claims of the ’966 and ’847 patents. The ALJ also found that there is no evidence of patent hold-up by InterDigital, but that there is evidence of reverse hold-up by the respondents. The ALJ found that the public interest does not preclude issuance of an exclusion order. The ALJ did not issue a Recommended Determination on remedy or bonding.

On May 11, 2015, MMO and Nokia Inc. (collectively, “MMO”) filed a petition for review of certain aspects of the RID, including infringement, domestic industry, and the public interest. Also on May 11, 2015, Nokia filed a petition for review of the RID with respect to infringement, domestic industry, and whether the Commission has jurisdiction over Nokia following the sale of its handset business to MMO. Further on May 11, 2015, the Commission investigative attorney (“IA”) filed a petition for review of the RID’s finding of infringement.

On May 19, 2015, InterDigital filed a response to MMO’s and the IA’s petitions for review. Also on May 19, 2015, MMO filed a response to the IA’s petition for review. Further on May 19, 2015, the IA filed a response to MMO’s and Nokia’s petitions for review.

On June 3, 2015, InterDigital filed a statement on the public interest pursuant to Commission Rule 210.50(a)(4). Also on June 3, 2015, several non-parties filed responses to the Commission Notice issued on May 4, 2015, including: United States Senator Robert Casey, Jr. of Pennsylvania; Microsoft Corporation; Intel Corporation, Cisco Systems, Inc., Dell Inc., and Hewlett-Packard Company; Innovation Alliance; and Ericsson Inc. See 80 FR 26295-96 (May 7,

2015). On June 24, 2015, United States Senator Patrick J. Toomey of Pennsylvania also filed a response to the Commission's May 4, 2015, notice.

On June 15, 2015, Respondents filed a motion for leave to file a reply in support of their petition for review. Respondents Microsoft Mobile Oy and Nokia Inc.'s Motion for Leave to File Reply of Respondents Microsoft Mobile Oy and Nokia Inc. in Support of Petition for Review (June 15, 2015). On June 17, 2015, the IA filed a response, opposing Respondents' motion. Office of Unfair Import Investigation's Response to Respondents Microsoft Mobile Oy and Nokia, Inc.'s Motion for Leave to File Reply in Support of Petition to Review (June 17, 2015). On June 19, 2015, InterDigital filed a response, opposing Respondents' motion. InterDigital's Response to Respondents MMO and Nokia, Inc.'s Motion for Leave to File a Reply in Support of Petition for Review (June 19, 2015). The motion is denied.

Having examined the record of this investigation, including the RID, the petitions for review, and the responses thereto, the Commission has determined to review the RID in part.

Specifically, the Commission has determined to review the RID's findings concerning the application of the Commission's prior construction in Certain Wireless Devices with 3G Capabilities and Components Thereof, Inv. No. 337-TA-800 ("the 800 investigation") and Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof, Inv. No. 337-TA-868 ("the 868 investigation") of the claim limitation "successively [transmits/transmitted] signals." The Commission has also determined to review the RID with respect to whether the accused products satisfy the claim limitation "successively [transmits/transmitted] signals" as construed by the Commission in the 800 and 868 investigations. The Commission has further determined to review the RID's public interest findings.

The Commission has determined not to review the remaining issues decided in the RID.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission requests responses to the following questions:

1. Have Respondents waived any reliance on the application of the Commission's construction in the 800 and 868 investigations of the limitation "successively [transmits/transmitted] signals?"
2. Do the Commission's determinations in the 800 and/or 868 investigation constitute an intervening change of controlling legal authority such that the Commission should apply the construction of "successively [transmits/transmitted] signals" as found in those investigations in determining infringement in this investigation?
3. What evidence exists in the record of this investigation with respect to whether the accused products satisfy the "successively [transmits/transmitted] signals" limitation as construed by the Commission in the 800 and 868 investigations?
4. Please state and explain your position on whether, for purposes of the Commission's consideration of the statutory public interest factors, InterDigital has in effect asserted that the patents in question are FRAND-encumbered, standard-essential patents.
5. Please state and explain your position on whether InterDigital has offered Respondents licensing terms that reflect the value of its own patents.
6. What portion of the accused devices is allegedly covered by the asserted claims? Do the patents in question relate to relatively minor features of the accused devices?
7. Please state and explain your position on the legal significance of InterDigital's alleged willingness to accept an arbitral determination of FRAND terms with respect to the patents in question.

8. Please state and explain your position on the legal significance of InterDigital's alleged unwillingness to obtain a judicial determination of FRAND terms with respect to the patents in question.
9. Please state and explain your position on whether Respondents have shown themselves willing to take licenses to the patents in question on FRAND terms.
10. Do Respondents' alleged delaying tactics in negotiating with InterDigital provide sufficient evidence of reverse hold-up, regardless of Respondents' offers to license only InterDigital's U.S. patent portfolio?
11. Do Respondents' licensing counteroffers satisfy the requirements of the ETSI IPR Policy?
12. Please state and explain your position on whether the RID equates patent infringement and reverse hold-up.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (Dec. 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding issued in the original investigation on August 14, 2009. Complainant and OUII are requested to submit proposed remedial orders for the Commission's consideration and to provide identification information for all importers of the subject articles. Complainant and OUII are also requested to state the dates that the patents expire

and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on **July 10, 2015**. Initial submissions are limited to 125 pages, not including any attachments or exhibits related to discussion of the public interest. Reply submissions must be filed no later than the close of business on **July 20, 2015**. Reply submissions are limited to 75 pages, not including any attachments or exhibits related to discussion of the public interest. The parties may not incorporate by reference their prior filings before the ALJ or the Commission. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-613 REMAND") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: June 25, 2015.

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